

CASE NO. 19-3149

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: THRIVEST SPECIALTY FUNDING, LLC

THRIVEST SPECIALTY FUNDING, LLC
PETITIONER,

V.

HONORABLE ANITA B. BRODY, JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
RESPONDENT.

CASE NO. 12-MD-02323 (E.D. PA)

**MOTION FOR LEAVE TO INTERVENE OF
CLASS MEMBER WILLIAM E. WHITE TO FILE, INSTANTER, THE
ATTACHED RESPONSE TO THE PETITION FOR WRIT OF
MANDAMUS**

Respectfully submitted,

/s/ Robert C. Wood

Robert C. Wood (0071861)

WOOD LAW LIMITED

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New Albany, Ohio 43054

(614) 252-3146

rwood@rwoodlaw.com

Counsel for Class Member William E. White

William E. White, pursuant to the Federal Rules of Appellate Procedure, and all applicable equitable powers of this Court, hereby requests permission to intervene in this action. This Court's disposition of the certain of the errors of law alleged in the Petition for Writ of Mandamus (the "Petition") involve questions of law which are common to a defense Mr. White has asserted in the pending arbitration between Thrivest Specialty Funding, LLC, and Mr. White. As such, Mr. White has a compelling interest in this Court's disposition of the Petition for Writ of Mandamus to the extent it may impact upon his rights.

Background

Class Member, Mr. White, an eleven (11) year veteran of the National Football League, was diagnosed with a neurocognitive disability on June 21, 2016, which is marked by problems with cognitive functioning and which reflects acquired brain dysfunction. On October 19, 2016, Mr. White was diagnosed with ALS (amyotrophic lateral sclerosis) which has resulted in prodromal dementia.

On December 19, 2016, Mr. White entered into a "Non-Recourse Finance Transaction (Sales and Purchase Agreement)" with Thrivest Specialty Funding, LLC, pursuant to which he received a cash advance in the amount of \$475,000.00 (the "Legal Funding Agreement"). On December 8, 2017, the District Court

entered an order which rendered the Legal Funding Agreement void in its entirety. On February 20, 2018, the District Court entered “a ministerial order designed to effectuate” the December 8, 2018 order.

In March of 2018, Mr. White, as directed by the District Court, offered Thrivest the option of accepting rescission of the Legal Funding Agreement, including the return of the amount advanced to him. Thrivest refused to accept rescission and commenced arbitration against Mr. White on April 1, 2018 (the “Arbitration”). On May 1, 2018, Thrivest filed a complaint against Mr. White to compel arbitration. On May 22, 2018, the District Court enjoined the Arbitration. In August of 2018, the complaint to compel arbitration was dismissed consistent with the May 22, 2018 order. Ultimately, Thrivest appealed the foregoing orders of the District Court to this Court, and they were disposed of in the matter captioned *Thrivest v. White*, 923 F.3d 96 (3d Cir. 2019).

In that matter, this Court affirmed the December 8, 2017 order in so far as “any true assignments contained within [third-party] cash advance agreements - that is, contractual provisions that allowed the lender to step into the shoes of the player and seek funds directly from the settlement fund - were void *ab initio*.” *Id.* at 110. This Court reversed that order to the extent that it voided the cash advance agreements “in their entirety.” *Id.* at 111.

In so doing, this Court announced that: (1) it expressed “no opinion as to the **ultimate enforceability** of any of the cash advance agreements” *Id.* at 112 (emphasis added); (2) it “in no way” suggested that “any individual agreement is enforceable” *Id.* at 113; and (3) “a court or arbitrator subsequently adjudicating these issues will need to address **whether any individual agreement contains a true assignment** and **whether there remain enforceable rights under the agreement after any true assignment is voided.**” *Id.* at 112 (emphasis added).

On April 26, 2019, this Court remanded the matter to proceed before the District Court, and in the Arbitration consistent with its disposition and mandates. In July of 2019, the District Court granted the motion to compel arbitration. On October 8, 2019, a final hearing was commenced to hear oral arguments in the Arbitration wherein Thrivest asserted that it is owed approximately \$1,200,000.00, including \$415,000.00 in interest charges, and \$300,000.00 in attorney fees, in addition to the \$475,000.00 cash advance under the terms of the Legal Funding Agreement.

Throughout the Arbitration, Thrivest hailed this Court’s holding in *Thrivest v. White*, 923 F.3d 96 (3d Cir. 2019) as a victory, and, in support claims that this Court has already considered the Legal Funding Agreement, and determined, as a matter of law, that it is enforceable because its agreement “gave it only the right to

receive settlement funds after the funds are disbursed to a class member.” *Id.* at 112.

Concise Statement of Interest

Mr. White has an interest in this matter because at issue, in part, is whether this Court has already determined, as a matter of law, that the Legal Funding Agreement is not a true assignment, i.e., that it does not give Thrivest the right to receive settlement funds until after the funds are disbursed to a class member. And given that Thrivest is seeking to recover approximately \$1,200,000.00 from Mr. White, this Court’s disposition of that issue within the Petition will likely have very serious financial consequences to Mr. White. Specifically, in the Petition, Thrivest has alleged, as a clear error of law, that:

Indeed, although this Court [already] held that Thrivest’s agreement ‘gave it only the right to receive settlement funds after the funds are disbursed to a class member,’ the Claims Administrator recently declared the agreement void in its entirety under Section 30.1 of the Settlement Agreement - another clear error.

See Petition (Dkt 003113353785) at 10.

Mr. White’s position is that this Court: (1) made clear that legal determinations of whether or not a third party funding agreement contains a true assignment are outside of the scope of its authority; (2) made clear that it was expressing no opinion as to the ultimate enforceability of any agreement; and (3)

instructed courts or arbitrators, when analyzing third party funding agreements going forward, of the proper standard to apply when determining whether an agreement contains a true assignment.

Moreover, if the standard of analysis announced by this Court in *Thrivest v. White*, 923 F.3d 96 (3d Cir. 2019), is undertaken here, there is no question that the plain language of Section 2(a) of the Legal Funding Agreement evidences a true assignment.

SECTION 2. GENERAL TERMS OF THE PURCHASE AND SALE

- (a) **Seller** absolutely **assigns, conveys, sells, sets over, transfers,** and warrants **to Buyer all rights,** title, benefits, and interests of **Seller in and to:**
 - i. The **TSF Distribution, all rights to payment** of or on account of the TSF Distribution, and **all proceeds of Distribution** until Buyer has collected the TSF Distribution; and
 - ii. **All rights of Seller to ask for, demand, sue for, collect, receive, and enforce payment of the Distribution** and to enforce all other covenants and obligations in connection with the Distribution payable to Seller, and the rights and remedies of Seller, in respect of the Distribution, until Buyer has collected the TSF Distribution (collectively, the “Purchased Property”), in each instance free and clear of all claims, liens, interests and encumbrances (collectively, “Adverse Interests”)...

See Dkt 033112955853, Exhibit A.

This section purports to give Thrivest the express right to seek funds from the Claims Administrator at the time the Legal Funding Agreement was entered into, well before any funds are received by the class member rather than after a class member receives funds from the Claims Administrator. Mr. White, therefore, seeks leave to file, instantler, the attached Response to the Petition for Writ of Mandamus which is limited to the issues related to the error of law discussed herein.

CONCLUSION

Mr. White hereby requests respectfully that he be granted leave to intervene for the limited purposes outlined herein. He further requests a declaration from this Court that it did not, in *Thrivest v. White*, 923 F.3d 96 (3d Cir. 2019), determine, as a matter of law, that the Thrivest Agreement “gave it only the right to receive settlement funds after the funds are disbursed to a class member,” or that the Thrivest Agreement does not contain a true assignment under the analysis it announced in disposing of that case. To erase any doubt or confusion, Mr. White further asks this Court to reaffirm its pronouncement that, going forward, it is the courts or arbitrators, as the case may be, that are charged with determining whether third party funding agreements, including the Thrivest Agreement, contain true

assignments consistent with the standard of analysis announced in *Thrivest v. White*, 923 F.3d 96 (3d Cir. 2019).

Respectfully submitted,

/s/ Robert C. Wood

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Counsel for Class Member William E. White

Dated: October 10, 2019

CERTIFICATE OF SERVICE

I, Robert C. Wood, hereby certify that the foregoing was electronically filed on this date; it is available for viewing and downloading on the Court's CM/ECF system; and it will be served on all counsel of record via the Court's CM/ECF system.

Dated: October 10, 2019

/s/ Robert C. Wood

Robert C. Wood

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**CLASS MEMBER WHITE'S RESPONSE TO THE PETITION FOR WRIT
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Counsel for William E. White

Mr. White hereby incorporates the background information set forth in his Motion for Leave to Intervene to file, Instantly, this Response to the Petition for Writ of Mandamus.

ARGUMENT

In relevant portion, Thrivest asserts, as an error of law, in the Petition for Writ of Mandamus that:

Indeed, Although this Court [already] held that Thrivest's agreement 'gave it only the right to receive settlement funds after the funds are disbursed to a class member,' the Claims Administrator recently declared the agreement void in its entirety under Section 30.1 of the Settlement Agreement - another clear error.

See Petition for Writ of Mandamus (Dkt 003113353785) at 10(emphasis added).

In response to Thrivest's contention that this Court has determined, as a matter of law, that its agreement only gives it the right to receive settlement funds after the funds are disbursed to the class member, Mr. White points to: (1) this Court's directive "that a court or arbitrator subsequently adjudicating these issues will need to address whether any individual agreement contains a true assignment. . ."; and (2) the plain language of Section 2(a) of the Thrivest Agreement.

A. The Plain Language of the Legal Funding Agreement renders it void as a True Assignment under the standard set forth by the This Court in *Thrivest v. White*.

The plain language of the Legal Funding Agreement - which expressly authorizes Thrivest to seek funds directly from the NFL Claims Administrator under

Section 2(a) - renders it a true assignment under the standard set forth by in *Thrivest v. White*. This Court “adopt[ed] the District Court’s interpretation and conclude[d] that any true assignments contained within the cash advance agreements—that is, contractual provisions that allowed the lender to step into the shoes of the player and seek funds directly from the settlement fund— were void *ab initio*” *Id.* at 110.

Here, it is undisputed that the Legal Funding Agreement is a true assignment because, pursuant to section 2(a), purportedly, all of the class member’s rights, including the right to sue and to collect directly from the NFL Claims Administrator for the assigned TSF Distribution, were transferred to Thrivest as follows:

SECTION 2. GENERAL TERMS OF THE PURCHASE AND SALE

- (a) **Seller** absolutely **assigns, conveys, sells, sets over, transfers,** and warrants **to Buyer all rights,** title, benefits, and interests of **Seller in and to:**
 - i. The **TSF Distribution, all rights to payment** of or on account of the TSF Distribution, and **all proceeds of Distribution** until Buyer has collected the TSF Distribution; and
 - ii. **All rights of Seller to ask for, demand, sue for, collect, receive, and enforce payment of the Distribution** and to enforce all other covenants and obligations in connection with the Distribution payable to Seller, and the rights and remedies of Seller, in respect of the Distribution, until Buyer has collected the TSF Distribution (collectively, the “**Purchased Property**”), in each instance free and clear of all claims, liens, interests and encumbrances (collectively, “**Adverse Interests**”)....

Section 2(a) of the Legal Funding Agreement establishes clearly that it contains an impermissible true assignment under the standard set forth by this Court. “When a valid assignment is made, the assignee steps into the assignor’s shoes and acquires whatever rights the latter had.” *Id.* at 110. Here, “contractual provision [section 2(a)(ii)] . . . allow[s] . . . [Thrivest] to seek funds directly from the settlement fund.”¹ *Id.* at 110.

B. If the Legal Funding Agreement is a True Sale, it is also by definition, a True Assignment.

Under the express terms of Section 2(a) of the Legal Funding Agreement, Thrivest asserts that it purchased, via a “true sale,” “all rights, title, benefits and interests of . . . [Mr. White] in and to . . . the TSF Distribution [\$475,000], all rights to payment of or on account of the TSF Distribution, and all proceeds of Distribution until . . . [Thrivest] has collected the TSF Distribution.” Under this plain language, Thrivest expressly acquired the class member’s right to payment from the settlement fund, through the NFL Claims Administrator, at the time of purchase of those rights until it received payment of the TSF Distribution. Its right to payment from the settlement fund was obtained from the class member in December of 2016 - when those rights were purchased - approximately 18 months

prior to the date upon which the NFL Claims Administrator paid to the class member his award.

C. Section 2(a) of the Legal Funding Agreement Creates and Establishes various rights to Repayment of the Cash Advance which are consistent with its purchase of Mr. White's rights to his Award.

Section 2(a) of the Legal Funding Agreement contemplates various methods of payment consistent with Thrivest's purported purchase of the class member's rights in and to the Distribution. Section 2(a) assigns to Thrivest the express **immediate right** to: (1) **receive payment** of on or account of the TSF Distribution; (2) **receive all proceeds** of the Distribution until the Buyer has collected the TSF Distribution; (3) **ask for** payment of the Distribution from the NFL Claims Administrator; (4) **demand** payment of the Distribution from the NFL Claims Administrator; (5) **sue for** payment of the Distribution from the NFL Claims Administrator; (6) **collect** payment of the Distribution from the NFL Claims Administrator; (7) **receive** payment of the Distribution from the NFL Claims Administrator; (8) **enforce** payment of the Distribution from the NFL Claims Administrator; and (9) **enforce** all other covenants and obligations in connection with the Distribution payable to Mr. White, including his rights and remedies. To be sure, Thrivest defines, collectively, each of the foregoing rights as its "Purchased Property." Under Section 2(b) of the Legal Funding Agreement, Thrivest asserts

that it acquired the Purchased Property in December of 2016¹ in exchange for an advance to Mr. White in the amount of \$475,000.00.

D. Section 2(c) of the Legal Funding Agreement contemplates a method of Repayment but Does not Create or Establish a Right to Payment.

In relevant portion, Section 2(c) of the Legal Funding Agreement provides that:

Within three (3) business days after . . . [Mr. White's] collection and receipt, or the collection and receipt on . . . [Mr. White's] behalf, of any Distribution, . . . [Mr. White] shall distribute, or cause to be distributed, all such collections and receipts to . . . [Thrivest]. . .

As outlined above, the Purchased Property is defined as the rights to repayment Thrivest purchased in exchange for the cash advance. Section 2(c) does not create or otherwise establish a right to repayment. Under Section 2(a) of the Legal Funding Agreement, those rights were created in December of 2016 - at the time the rights were purportedly assigned, sold, and purchased. Section 2(c) of the Legal Funding Agreement contemplates a scenario for repayment where, Mr. White, first receives proceeds from the NFL Claims Administrator. In that scenario, it provides that the **timing for repayment** is 3 days following Mr.

¹ Mr. White entered into the Legal Funding Agreement in December of 2016, after being diagnosed with a cognitive impairment in June of 2016, and ALS in October of 2016. And this Court acknowledged that “it is possible that some of the class members are cognitively impaired, and it is possible that some of them lacked the capacity to contract at the time they entered into the agreements.” Id. at 112.

White's collection and receipt of his Award. This provision, however, does not limit, alter, or impact, in any manner, Thrivest's purported express rights under section 2(a) - obtained in December of 2016 - to stand in the class member's shoes, submit a claim, and seek funds directly from the Claims Administrator **prior** to the class member receiving the funds.

Additional language in Section 2(c) also supports the conclusion that the class member's rights to his Award [the Purchased Property], were purportedly transferred to Thrivest in December of 2016 at the time of purchase:

Seller and Buyer intend and agree that **the Transaction shall constitute a true sale and absolute transfer of the Purchased Property** to . . . [Thrivest], thereby providing . . . [Thrivest] with the full risks and benefits of ownership of the Purchased Property. . . **and each . . . [party] agrees that this transaction shall be reflected on their respective books and records in a manner consistent with this intent and agreement.**

E. Whether or not Thrivest attempted to submit a claim to the Claims Administrator does not impact the true assignment analysis announced by this Court.

On September 6, 2019, counsel for Mr. White received from counsel from another class member that entered into a legal funding agreement with Thrivest, an unexecuted "Notice of Assignment," a copy of that correspondence and the Notice are attached hereto as Exhibit A. Counsel for Thrivest denies knowing the author of the Notice of Assignment or ever submitting to the Claims Administrator this or any similar notices. In the Arbitration, Thrivest asserted that "Thrivest it never

submitted any notices **after** the Claims Administrator made clear that it would not recognize liens from funding companies.”

Whether or not Thrivest attempted to submit a claim to the Claims Administrator pursuant to its purported rights under Section 2(a) of the Legal Funding Agreement does not impact the applicable true assignment analysis. The lone inquiry is whether the agreement gives it the right to submit a claim to the Claims Administrator and receive settlement funds prior to the class member.

CONCLUSION

Mr. White requests a declaration from this Court that it did not, in *Thrivest v. White*, 923 F.3d 96 (3d Cir. 2019), determine, as a matter of law, that the Thrivest Agreement “gave it only the right to receive settlement funds after the funds are disbursed to a class member,” or that the Thrivest Agreement does not contain a true assignment under the analysis it announced in disposing of that case. And to erase any doubt or confusion, Mr. White further asks this Court to reaffirm its pronouncement in *Thrivest v. White* that, going forward, it is the courts or arbitrators, as the case may be, that are charged with determining whether third party funding agreements, **including the Thrivest Agreement**, contain true assignments consistent with the standard of analysis announced in *Thrivest v. White*, 923 F.3d 96 (3d Cir. 2019).

Respectfully submitted,

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I, Robert C. Wood, hereby certify that the foregoing was electronically filed on this date; it is available for viewing and downloading on the Court's CM/ECF system; and it will be served on all counsel of record via the Court's CM/ECF system.

Dated: October 10, 2019

/s/ Robert C. Wood

Robert C. Wood

EXHIBIT A

Robert Wood

From: Sam Pittman [spittman@ellettllaw.com]
Sent: Friday, September 06, 2019 12:38 PM
To: rwood@rwoodlaw.com
Cc: Ronald J. Ellett
Subject: RE: Thrivest Specialty Funding, LLC v. William E. White - Case 01-18-0001-4765
Attachments: 2016.01.28 NFL Administrator Notice of Assignment Letter (Toby L. Wright....pdf

Rob,

Did Thrivest file a notice of assignment with the NFL claims administrator similar to the one attached? If so, could you provide us a copy?

Sam

From: Robert Wood <rwood@rwoodlaw.com>
Sent: Wednesday, August 28, 2019 9:25 AM
To: Sam Pittman <spittman@ellettllaw.com>
Cc: Rob Wood <rwood@rwoodlaw.com>
Subject: FW: Thrivest Specialty Funding, LLC v. William E. White - Case 01-18-0001-4765

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NOTICE OF ASSIGNMENT

TO: NFL CLAIMS ADMINISTRATOR

RE: In Re: National Football League Players' Concussion Injury Litigation
No. 2:12-md-02323-AB / MDL No. 2323
Toby L. Wright; Claim #: _____

You are hereby notified that on January 28, 2016, Toby L. Wright ("Assignor"), transferred and assigned to the undersigned, Thrivest Specialty Funding, LLC, (TSF), a portion of the Assignor's right, title and interest regarding the National Football League Players' Concussion Injury Litigation Settlement in the amount of \$3,000,000.00 (Three Million Dollars and No Cents) (the "Judgment"), and that the portion of the Assignor's interest in *In re: National Football League Player's Concussion Injury Litigation; Docket No: 2:12-md-02323-AB / MDL No. 2323* that is assigned to TSF is the amount of \$810,000.00 (Eight Hundred Ten Thousand Dollars and No Cents).

You are hereby instructed that, promptly following receipt of funds representing Assignor's interest in the Judgment, you are to issue a check to Thrivest Specialty Funding, LLC (TSF) in the sum of the Property Amount pursuant to the Agreement between the parties. You are further instructed that any distribution of the Property Amount to any person other than TSF shall be in violation of the Agreement and shall result in Claims Administrator being held liable for damages and attorneys' fees for any loss suffered by TSF hereunder.

THRIVEST SPECIALTY FUNDING, LLC
2 Penn Center Plaza
1500 JFK Blvd, Suite 220
Philadelphia, PA 19102

Tax ID #: 47-5081452

BY: _____
Authorized Representative

DATE: _____

Assignor: _____
Toby L. Wright

BY: _____
Signature of Player

DATE: _____

BY: _____
Michelle L. Smith
As Power of Attorney for Toby L. Wright

DATE: _____